

No.: 70475

IN THE SUPREME COURT OF THE STATE OF NEVADA

Ditech Financial, LLC f/k/a Green Tree Servicing, LLC,

Appellant,

vs.

Sanford Buckles, *on behalf of himself and others similarly situated,*

Respondent.

CERTIFIED QUESTION

from the United States District Court, District of Nevada
District Court, Case No. 2:15-cv-01581-GMN-CWH

**Opposition to
National Association of Criminal Defense Lawyers'
Motion for Leave to File an Amicus Curiae Brief**

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NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. Sanford Buckles.

B. Attorneys with Kazerouni Law Group, APC and Haines & Krieger, LLC have appeared on behalf of Sanford Buckles.

C. Attorneys with Hyde & Swigart are expected to appear before this Court on behalf of Sanford Buckles.

Dated this 23rd day of October 2016.

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Summary of Argument

Respondent Sanford Buckles (“Mr. Buckles”) hereby opposes the National Association of Criminal Defense Lawyers’ (“NACDL”) Motion for Leave to File an Amicus Curiae Brief. Accompanying its motion, NACDL filed its proposed amicus curiae brief as Exhibit 1 (the “Proposed Amicus Brief”).

Mr. Buckles seeks *only* civil relief for secret telephone recordings made by Green Tree of telephone conversations with Mr. Buckles. The Proposed Amicus Brief relates only to NRS 620’s application to criminal law, which is not at issue in this case. NACDL asks this Court to consider an issue on a hypothetical basis—something this Court has repeatedly declined to do. *E.g., Resnick v. Nev. Gaming Comm’n*, 104 Nev. 60, 66, 752 P.2d 229, 233 (1988).

The Certified Question asks this Court to decide whether Mr. Buckles may seek civil relief under NRS 200.620 for secret telephone recordings made by Green Tree, a mortgage servicer that regularly records telephone conversations with people in Nevada regarding Nevada mortgages, if the recording equipment is located outside Nevada. The Proposed Amicus Brief, however, includes arguments limited to criminal law, not at issue in this case. The Proposed Amicus Brief relies only on constitutional arguments and this Court has consistently refused to consider constitutional arguments unless it is necessary to determine a case. *E.g., State of Nevada v. Plunkett*, 62 Nev. 265, 270-71, 149 P.2d 101, 104 (1944).

The almost identical California Supreme Court case, *Kearney v. Salomon Smith Barney, Inc.*, that declined to consider the criminal law issues when presented with a civil action involving secret recordings made outside of California, may further persuade this Court to deny

NACDL's motion for leave to file an amicus curiae brief. 39 Cal. 4th 95, 116 n.6, 45 Cal. Rptr. 3d 730, 747, 137 P.3d 914, 928 (2006).

Argument

A. The Proposed Amicus Brief raises criminal law related issues that are not relevant to this case

NACDL's motion for leave to file an amicus curiae brief should be denied. The Proposed Amicus Brief includes constitutional arguments against application of NRS 200.620 to telephone recordings of conversations with people inside Nevada using recording equipment outside of Nevada in criminal cases. This is a civil case, however, that involves a corporation that regularly services mortgages of Nevada properties and secretly recorded Mr. Buckles, a Nevada resident, in Nevada, on a Nevada phone number, regarding a Nevada mortgage.

The California Supreme Court, in a case involving an almost identical recording statute at issue in this case—that included both civil liability and criminal penalties—found that it was not appropriate to determine any criminal law implications of the statute in deciding whether the statute applied to recordings made outside of California in a civil action:

[T]he issue presented here is whether plaintiffs may maintain a civil cause of action for damages and/or injunctive relief under section 637.2 on the basis of the facts alleged in the complaint, and in resolving that issue there is no need to determine whether penal sanctions properly could or should be imposed under these circumstances. In accordance with traditional notions of judicial restraint, we believe it is appropriate and prudent to wait until we are faced with an instance in which a prosecutor has chosen to charge a criminal offense on the basis of such conduct before addressing the legal issues that might be raised in such a prosecution.

Kearney, 39 Cal. 4th at 116 n.6, 45 Cal. Rptr. 3d at 747, 137 P.3d at 928 (ruling that California’s recording statute applied to secret telephone recordings made outside of California).

For the following reasons, this Court should deny NACDL’s motion because the criminal law arguments it raises are not at issue in this case. First, any criminal application of NRS 200.620 would not “be determinative” of the Federal case. NRAP 5(a). Second, the Proposed Amicus Brief raises criminal law related issues that will not be helpful to this Court in this case. Third, this Court should decline to address hypothetical issues that are not “in controversy” under judicial standing principles. Finally, NACDL’s failure to comply with NRAP 44 is an independent basis to reject its constitutional arguments and to deny its motion.

1. The Proposed Amicus Brief concerns criminal law issues that will not “be determinative” of the Federal case under NRAP 5(a)

NACDL’s motion should be denied because the issues raised in the Proposed Amicus Brief are not relevant to determine the Federal case.

The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or of the District of Columbia, a United States District Court, or a United States Bankruptcy Court when requested by the certifying court, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Appeals of this state.

NRAP 5(a) (emphasis added); *e.g.*, *Weinstein v. Fox (In re Fox)*, 302 P.3d 1137, 1139 (Nev. 2013) (“[I]n determining whether to exercise its discretion to consider certified questions, this court looks to whether the

answers may ‘be determinative’ of part of the federal case, there is no controlling Nevada precedent, and the answer will help settle important questions of law.”) (citing *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 750-51, 137 P.3d 1161, 1164 (2006)) (quotation marks and brackets omitted); *see generally* *Volvo Cars*, 122 Nev. 746, 137 P.3d 1161 (discussing NRAP 5(a) at length and declining to answer the certified question because “it would not ‘be determinative’ of any part of the case”).

This Court specifically accepted the Certified Question because the “answers may determine the federal case”—a civil action. *See* Order Accepting Certified Questions, Jun. 24, 2016. Furthermore, the United States District Court for the District of Nevada, definitively certified the question to this Court since it was necessary to reach a dispositive question in Mr. Buckles’ Federal civil action. Certification Order, dated May 25, 2016, p. 2. Therefore, NACDL’s motion should be denied because the criminal law related issues raised in the Proposed Amicus Brief are not determinative of Mr. Buckles’ cause of action.

2. The Proposed Amicus Brief concerns criminal law issues and will not “assist” this Court in this case

This Court has previously denied motions for leave to file amicus curiae briefs where the proposed amicus brief would not “assist” this Court in the particular case. *E.g.*, *Dow Chem. Co. v. Mahlum*, 115 Nev. 13, 15 n.1, 973 P.2d 842, 843 (1999) (in denying a petition for rehearing, this Court denied the motions for leave to file amicus curiae briefs in support of the petition since the briefs raised issues that substantially mirrored those already raised and “[s]uch briefs will not assist this court”); *see also* *Smith v. Chrysler Fin. Co.*, Civil Action No. 00-6003 (DMC), 2003 LEXIS 1798, at *23 (D.N.J. Jan. 14, 2003) (“The rationale

for permitting amicus is to assist the court.”) (citing *CEWaste Mgmt., Inc. v. City of York*, 162 F.R.D. 34, 37 (M.D. Pa. 1995)); *American Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (Cl. Ct. 1991) (“Perhaps the most important is whether the court is persuaded that participation by the amicus will be useful to it, as contrasted with simply strengthening the assertions of one party.”); *Portland Fish Co. v. States S.S. Co.*, 510 F.2d 628, 634 (9th Cir. 1974) (the motion for leave to file amicus curiae brief that raised a question not before the court “will have to wait for another day”); *accord Dutt v. Kremp*, 109 Nev. 397, 397, 848 P.2d 1073, 1073 (1993) (“[T]he participation of the association as amicus curiae would assist in the court's deliberations.”).

This Court does not need to determine any criminal law to decide this civil case. Therefore, the Proposed Amicus Brief will not assist this Court in its determinations so NACDL’s motion should be denied.

3. Any criminal implications of NRS 200 are not “in controversy” in this case and are hypothetical only

The criminal law related issues raised in the Proposed Amicus Brief are not in controversy in this case so NACDL’s motion should be denied. “[L]itigated matters must present an existing controversy, not merely the prospect of a future problem.” *E.g., Leavitt v. Siems*, 330 P. 3d 1, 3 n.1 (Nev. 2014) (quoting *Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988) (appellants lacked standing to challenge statute’s constitutionality in absence of any personally suffered injury)) (quotation marks omitted); *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011) (“Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief.”) (citing *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (“[L]itigated matters must present an existing controversy,

not merely the prospect of a future problem.”)); *see also Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948) (recognizing that a declaration may be unavailable when the damage “is merely apprehended or feared”). As discussed, Mr. Buckles’ civil action does not raise any issues relating to criminal law. Because the Proposed Amicus Brief raises issues not in controversy, NACDL’s motion should be denied.

This Court should decline to consider the hypothetical criminal cases that the Proposed Amicus Brief raises and deny NACDL’s motion for leave to file an amicus curiae brief. This Court has consistently declined to consider issues on a hypothetical basis. *E.g., Leventhal v. Black & LoBello*, 305 P.3d 907, 910 n.6 (Nev. 2013) (question of whether a division of property in a divorce case is an affirmative recovery to which a lien may attach was not fairly presented, and “we decline to examine it on a hypothetical basis.”); *Resnick*, 104 Nev. at 66, 752 P.2d at 233 (finding appellant’s “argument is based on a purely hypothetical premise that we decline to consider” since appellant had not yet, in fact, been deprived of property or liberty). Mr. Buckles brought his case to challenge Green Tree’s actions in recording his phone conversations without his consent in a civil context only. Considering the Proposed Amicus Brief necessarily requires this Court to consider issues on a hypothetical basis and this Court should therefore deny NACDL’s motion.

4. This Court should decline to address NACDL’s constitutional arguments because NACDL failed to comply with NRAP 44

NACDL’s failure to comply with NRAP 44 is an independent basis for rejecting its constitutional arguments. NRAP 44 states:

If a party questions the constitutionality of an Act of the Legislature in a proceeding in which the state or its agency,

officer, or employee is not a party in an official capacity, the questioning party shall give written notice to the clerk of the Supreme Court immediately upon the filing of the docketing statement or as soon as the question is raised in the court. The clerk shall then certify that fact to the Attorney General.

NRAP44; *Candelaria v. Roger (In re Candelaria)*, 126 Nev. 408, 410, 245 P.3d 518, 519 (2010) (providing that a failure to comply with NRAP 44 is an independent basis for summarily rejecting a constitutional argument); *see also S. Highlands Cmty. Ass'n v. Eighth Judicial Dist. Court of Nev.*, Nos. 61940, 62587, 2014 Nev. Unpub. LEXIS 1820, at *5 n.3 (Nov. 10, 2014). Thus, NACDL's failure to give written notice to the clerk of this Court is an additional basis to reject NACDL's constitutional arguments and to deny its motion.

B. The Proposed Amicus Brief raises constitutional issues which are not necessary to the determination in this case

In addition to the issues raised in the Proposed Amicus Brief not being "in controversy" or helpful to the determination in this case, as discussed, this Court should, further, deny NACDL's motion because the Proposed Amicus Brief raises unnecessary constitutional questions.

This court has a 'long history of requiring an actual justiciable controversy as a predicate to judicial relief.' In cases for declaratory relief and where constitutional matters arise, this court has required plaintiffs to meet increased jurisdictional standing requirements.

Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel, 122 Nev. 385, 393, 135 P.3d 220, 225-26 (2006) (citations omitted).

This Court should deny NACDL's motion because in answering the Certified Question, it is not necessary to determine any constitutional issues regarding NRS 200.620's application to criminal law. "[A]

constitutional question will not be determined unless clearly involved, and a decision thereon is necessary to a determination of the case.” *Plunkett*, 62 Nev. at 270-71, 149 P.2d at 104 (citing *State ex rel. Adams v. Allen*, 55 Nev. 346, 347, 34 P.2d 1074, 1075 (1934)); see also *Gebers v. State*, 118 Nev. 500, 506 n.11, 50 P.3d 1092, 1095 (2002) (“[T]his court will not consider constitutional issues which are not necessary to the determination of an appeal.”) (quoting *Hollis v. State*, 96 Nev. 207, 210, 606 P.2d 534, 536 (1980)); *Spears v. Spears*, 95 Nev. 416, 417, 596 P.2d 210, 211 (1979) (A reviewing court is “not authorized to enter into a determination of the constitutionality of a statute on a supposed or hypothetical case which might arise thereunder.”) (quoting *Magee v. Whitacre*, 60 Nev. 202, 212, 106 P.2d 751, 752 (1940)). The Proposed Amicus Brief contains only constitutional arguments regarding the application of NRS 200.620 to criminal cases, framed in arguments of “constitutional principles,” “Federalism,” the “federal structure of the United States,” “Due Process,” the “Commerce Clause,” the “Dormant Commerce Clause” and the “Supremacy Clause.” This case is a civil action. Constitutional issues involving the statute’s application to criminal law are not at issue and, of course, are not “necessary to a determination of the case.”

Finally, should this Court decide to consider the criminal law related issues raised in the Proposed Amicus Brief, Mr. Buckles respectfully proposes that this Court request an amicus curiae brief from the State of Nevada regarding the application of NRS 200.620 to criminal cases. See NRAP 29(a); e.g., *Rubio v. State*, 124 Nev. 1032, 1041 n.29, 194 P.3d 1224, 1230 (2008) (recognizing this Court’s invitation to interested parties to submit amicus curiae briefs).

Conclusion

This is a civil case. The Proposed Amicus Brief addresses only criminal law issues in hypothetical factual scenarios. Under NRAP 5(a), this Court has agreed to consider whether NRS 200.620 applies to the facts in this case in order to determine Mr. Buckles' civil claims in the Federal case. NACDL's brief includes arguments related to criminal law and does nothing to assist this Court in its determination of this case. For the same reason, the criminal law issues raised by the Proposed Amicus Brief are not "in controversy," implicating judicial standing principles. Also, NACDL's failure to comply with NRAP 44, denying the State of Nevada its due process, is an additional basis to deny NACDL's motion.

Finally, the Proposed Amicus Brief includes only constitutional arguments and this Court has consistently declined to consider constitutional issues unless necessary to the determination of a case. NACDL's motion for leave to file an amicus curiae brief should therefore be denied.

DATED this 23rd day of October 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed and served on all participants appearing in this case the foregoing Opposition to National Association of Criminal Defense Lawyers' Motion for Leave to File an Amicus Curiae Brief with the Clerk of the Court of the Supreme Court of Nevada by using the Court's electronic filing system on October 23, 2016.

I further certify that the foregoing was served on the following participants in this case via U.S. Mail:

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